

**HAYES PAWLENKO LLP**  
MATTHEW B. HAYES (SBN 220639)  
mhayes@helpcounsel.com  
KYE D. PAWLENKO (SBN 221475)  
kpawlenko@helpcounsel.com  
1414 Fair Oaks Avenue, Unit 2B  
South Pasadena, CA 91030  
(626) 808-4357

Attorneys for Plaintiff:  
JAMES MCMANUS

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

JAMES MCMANUS, individually and )	
as a representative of a class of )	CASE NO.
participants and beneficiaries on behalf )	
of The Clorox Company 401(k) Plan, )	<b>CLASS ACTION COMPLAINT</b>
)	
Plaintiff, )	<b>AND DEMAND FOR JURY TRIAL</b>
)	
v. )	
)	
THE CLOROX COMPANY; THE )	
EMPLOYEE BENEFITS )	
COMMITTEE OF THE CLOROX )	
COMPANY 401(K) PLAN; and DOES )	
1 to 10 inclusive, )	
)	
Defendants. )	
)	

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL



**PARTIES**

4. The Clorox Plan is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. § 1002(2)(A) and § 1002(34) and is subject to the provisions of ERISA pursuant to 29 U.S.C. § 1003(a).

5. Defendant Clorox is a manufacturer of consumer cleaning and home care products headquartered in Oakland, California.

6. Clorox is both the Plan sponsor under 29 U.S.C. § 1002(16)(B) and the Plan administrator under 29 U.S.C. § 1002(16)(A) with broad authority over the administration and management of the Plan.

7. The Committee was created by Clorox to assist in the management of the Plan and was delegated with authority to, among other things, direct the trustee with respect to the crediting and distribution of the Plan assets.

8. Clorox and the Committee (together “Defendants”) are both named fiduciaries of the Plan and each exercised discretionary authority and discretionary control over the management and administration of the Plan with respect to the matters alleged herein and were fiduciaries of the Plan within the meaning of 29 U.S.C. § 1002(21)(A).

9. Plaintiff is a resident of California, was previously employed by Clorox in California, and is a current participant of the Plan whose account has been charged with a share of the Plan’s administrative expenses.

1           10. The defendants sued by the fictitious names DOES 1 through 10,  
2 inclusive, are Plan fiduciaries unknown to Plaintiff who exercise or exercised  
3 discretionary authority or discretionary control respecting the management of the  
4 Plan, exercise or exercised authority or control respecting the management or  
5 disposition of its assets, or have or had discretionary authority or discretionary  
6 responsibility in the administration of the Plan and are responsible or liable in some  
7 manner for the conduct alleged in the complaint. Plaintiff will amend this complaint  
8 to allege the true names and capacities of such fictitiously named defendants when  
9 they are ascertained.  
10

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12  
13           **FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

14           11. As required by 29 U.S.C. § 1102(a)(1), the Clorox Plan is maintained  
15 under a written document.  
16

17           12. In accordance with 29 U.S.C. § 1103(a), the assets of the Clorox Plan  
18 are held in a trust fund.  
19

20           13. The Plan is funded by a combination of wage withholdings by Plan  
21 participants and Company matching and non-elective contributions, each of which  
22 is deposited into the Plan's trust fund.  
23

24           14. Participants who contribute to the Plan receive a Company matching  
25 contribution of 100% of salary deferrals, up to a maximum of 4% of covered  
26 compensation.  
27  
28

1           15. Participants also receive a non-elective Company contribution in the  
2 amount of 6% of covered compensation.

3           16. Upon their deposit into the Plan's trust fund, all participant  
4 contributions and Company contributions become assets of the Plan.

5           17. As an individual account, defined contribution retirement plan, the  
6 Clorox Plan "provides for an individual account for each participant and for benefits  
7 solely upon the amount contributed to the participant's account, and any income,  
8 expenses, gains and losses, and any forfeiture of accounts of other participants which  
9 may be allocated to such participant's account." 29 U.S.C. § 1002(34).  
10

11           18. The Plan incurs expenses for general Plan administrative services such  
12 as legal, accounting, and/or recordkeeping services. To pay for these expenses, an  
13 annual fee is charged to Plan participants and deducted from their accounts. This  
14 annual fee is prorated and deducted on a quarterly basis.  
15

16           19. The deduction of these administrative expenses from participant  
17 accounts reduces the funds available to participants for distribution and/or investing.  
18

19           20. Participants in the Clorox Plan are immediately vested in their own  
20 contributions and the Company's matching contributions, along with any income or  
21 losses on those balances.  
22

23           21. The Company's non-elective contributions, plus any income or losses  
24 on those balances, vest in varying rates over a period of 5 years.  
25  
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28

1           22.    When a participant has a break in service prior to full vesting of the  
2 Company's non-elective contributions, the participant forfeits the balance of  
3 unvested Company contributions in his or her individual account and Defendants  
4 exercise discretionary authority and control over how these Plan assets are thereafter  
5 reallocated.  
6

7           23.    At the discretion of Defendants, forfeited nonvested accounts may be  
8 used to pay the Plan's expenses or reduce the Company's contributions to the Plan.  
9

10          24.    Although Defendants have discretion to use the forfeited funds to pay  
11 Plan expenses, and thereby reduce or eliminate the amounts charged to the  
12 participants' individual accounts to cover such expenses, Defendants have  
13 consistently declined to use any of these Plan assets for such purposes over at least  
14 the past 6 years.  
15

16          25.    Instead, Defendants have consistently chosen to utilize the forfeited  
17 funds in the Plan exclusively for the Company's own benefit, to the detriment of the  
18 Plan and its participants, by using these Plan assets solely to reduce Company  
19 contributions to the Plan.  
20

21          26.    In 2017, Company non-elective contributions to the Plan were reduced  
22 by \$1,023,000 as a result of Defendants' reallocation of forfeited funds for the  
23 Company's own benefit, and no forfeited funds were used to pay any part of the  
24 \$635,067 in Plan expenses.  
25  
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1           27. In 2018, Company non-elective contributions to the Plan were reduced  
2 by \$700,000 as a result of Defendants' reallocation of forfeited funds for the  
3 Company's own benefit, and no forfeited funds were used to pay any part of the  
4 \$958,497 in Plan expenses.  
5

6           28. In 2019, Company non-elective contributions to the Plan were reduced  
7 by \$1,181,000 as a result of Defendants' reallocation of forfeited funds for the  
8 Company's own benefit, and no forfeited funds were used to pay any part of the  
9 \$1,143,682 in Plan expenses.  
10

11           29. In 2020, Company non-elective contributions to the Plan were reduced  
12 by \$650,000 as a result of Defendants' reallocation of forfeited funds for the  
13 Company's own benefit, and no forfeited funds were used to pay any part of the  
14 \$1,160,889 in Plan expenses.  
15

16           30. In 2021, Company non-elective contributions to the Plan were reduced  
17 by \$840,000 as a result of Defendants' reallocation of forfeited funds for the  
18 Company's own benefit, and no forfeited funds were used to pay any part of the  
19 \$1,266,666 in Plan expenses.  
20

21           31. In 2022, Company non-elective contributions to the Plan were reduced  
22 by \$1,315,000 as a result of Defendants' reallocation of forfeited funds for the  
23 Company's own benefit, and no forfeited funds were used to pay any part of the  
24 \$1,273,494 in Plan expenses.  
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32. While Defendants' reallocation of the forfeitures in the Plan's trust fund to reduce its future non-elective contributions benefitted the Company by reducing its own contribution expenses, it harmed the Plan, along with its participants and beneficiaries, by reducing future Company contributions that would otherwise have increased Plan assets and by causing participants to incur deductions from their individual accounts each year to cover administrative expenses that would otherwise have been covered in whole or in part by utilizing forfeited funds.

### **CLASS ACTION ALLEGATIONS**

33. 29 U.S.C. § 1132(a)(2) authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to enforce a breaching fiduciary's liability to the Plan under 29 U.S.C. § 1109(a).

34. In acting in this representative capacity and to enhance the due process protections of unnamed participants and beneficiaries of the Plan, as an alternative to direct individual actions on behalf of the Plan under 29 U.S.C. § 1132(a)(2), Plaintiff seeks to certify this action as a class action on behalf of all Clorox Plan participants and beneficiaries. Plaintiff seeks to certify the following class:

All participants and beneficiaries of the Clorox Plan from  
October 18, 2017 through the date of judgment, excluding  
Defendants and members of the Committee of the Clorox Plan.

///



1           35. This action meets the requirements of Rule 23 and is certifiable as a  
2 class action for the following reasons:

3           a. The class includes over 9,000 members and is so large that  
4 joinder of all its members is impracticable.

5  
6           b. There are questions of law and fact common to the class because  
7 Defendants owed fiduciary duties to the Plan and to all participants and beneficiaries  
8 and took the actions alleged herein as to the Plan and not as to any individual  
9 participant. Thus, common questions of law and fact include the following, without  
10 limitation: Who are the fiduciaries liable for the remedies provided by 29 U.S.C. §  
11 1109(a)? Did the fiduciaries of the Plan breach their fiduciary duties to the Plan with  
12 respect to their management and allocation of Plan assets? Did fiduciaries of the  
13 Plan engage in prohibited transactions with Plan assets? Did fiduciaries of the Plan  
14 violate the anti-inurement provision of ERISA by using Plan assets for their own  
15 benefit? What are the losses to the Plan resulting from each alleged breach of  
16 ERISA? What Plan-wide equitable and other relief should the Court impose to  
17 remedy Defendants' alleged breaches?  
18  
19

20           c. Plaintiff's claims are typical of the claims of the class because  
21 Plaintiff was a participant of the Plan during the class period and all participants in  
22 the Plan were harmed by the same alleged misconduct by Defendants.  
23

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1           d. Plaintiff is an adequate representative of the class because he was  
2 a participant of the plan during the class period, has no interests that conflict with  
3 any other members of the class, is committed to the vigorous representation of the  
4 class, and has engaged experienced and competent attorneys to represent the class.

5  
6           e. Prosecution of separate actions for these breaches of fiduciary  
7 duties and prohibited transactions by individual participants and beneficiaries would  
8 create the risk of (A) inconsistent or varying adjudications that would establish  
9 incompatible standards of conduct for Defendants with respect to their discharge of  
10 their fiduciary duties to the Plan and personal liability to the Plan under 29 U.S.C. §  
11 1109(a), and (B) adjudications by individual participants and beneficiaries regarding  
12 these breaches of fiduciary duties, prohibited transactions, and remedies for the Plan  
13 would, as a practical matter, be dispositive of the interests of the participants and  
14 beneficiaries not parties to the adjudication or would substantially impair or impede  
15 those participants' and beneficiaries' ability to protect their interests. Therefore, this  
16 action should be certified as a class action under Rule 23(b)(1)(A) or (B).

17  
18           36. A class action is the superior method for the fair and efficient  
19 adjudication of this controversy because joinder of all participants and beneficiaries  
20 is impracticable, the losses suffered by individual participants and beneficiaries may  
21 be small and impracticable for individual members to enforce their rights through  
22 individual actions, and the common questions of law and fact predominate over  
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1 individual questions. Given the nature of the allegations, no class member has an  
2 interest in individually controlling the prosecution of this matter, and Plaintiff is  
3 aware of no difficulties likely to be encountered in the management of this matter as  
4 a class action. Alternatively, then, this action may be certified as a class under Rule  
5 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).  
6

7  
8 37. Plaintiff's counsel, Hayes Pawlenko LLP, will fairly and adequately  
9 represent the interests of the Class and is best able to represent the interests of the  
10 class under Rule 23(g).  
11

## 12 **FIRST CLAIM**

### 13 **BREACH OF FIDUCIARY DUTY OF LOYALTY**

#### 14 **(29 U.S.C. 1104(a)(1)(A))**

15  
16 38. Plaintiff realleges and incorporates herein by reference each and every  
17 allegation contained in the preceding paragraphs of this Complaint as though fully  
18 set forth herein.  
19

20 39. Pursuant to 29 U.S.C. § 1104(a)(1)(A), Defendants were required to  
21 discharge their duties to the Clorox Plan "solely in the interest of the participants  
22 and beneficiaries" and "for the exclusive purpose of: (i) providing benefits to  
23 participants and their beneficiaries; and (ii) defraying reasonable expenses of  
24 administering the plan."  
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1           40. Defendants have continually breached this duty of loyalty with respect  
2 to their control and management of the Plan's assets throughout the class period by  
3 choosing to utilize forfeited funds in the Plan for the benefit of the Company rather  
4 than solely in the interest of the participants and beneficiaries.  
5

6           41. Instead of acting solely in the interest of Plan participants by utilizing  
7 forfeited funds in the Plan to reduce or eliminate the administrative expenses charged  
8 to their individual accounts, Defendants chose to use these Plan assets for the  
9 exclusive purpose of reducing its own future contributions to the Plan, thereby  
10 saving the Company millions of dollars at the expense of the Plan which received  
11 decreased Company contributions and its participants and beneficiaries who were  
12 forced to incur avoidable expense deductions to their individual accounts.  
13  
14  
15

16           42. As a direct and proximate result of Defendants' fiduciary breaches  
17 described herein, the Plan suffered injury and loss for which they are personally  
18 liable and are subject to appropriate equitable relief, pursuant to 29 U.S.C. § 1109,  
19 including, without limitation, the disgorgement of all ill-gotten profits to Defendants  
20 resulting from the breach of their duty of loyalty.  
21  
22

23           43. Each Defendant knowingly participated in the breach of the other  
24 Defendants, knowing that such acts were a breach, enabled other Defendants to  
25 commit a breach by failing to lawfully discharge its own fiduciary duties, knew of  
26 the breach by the other Defendants and failed to make any reasonable effort under  
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1 the circumstances to remedy the breach. Thus, each Defendant is liable for the losses  
2 caused by the breach of its co-fiduciary under 29 U.S.C. § 1105(a).

3 **SECOND CLAIM**

4 **BREACH OF FIDUCIARY DUTY OF PRUDENCE**

5 **(29 U.S.C. 1104(a)(1)(B))**

6  
7 44. Plaintiff realleges and incorporates herein by reference each and every  
8 allegation contained in the preceding paragraphs of this Complaint as though fully  
9 set forth herein.  
10

11 45. Pursuant to 29 U.S.C. § 1104(a)(1)(B), Defendants were required to  
12 discharge their duties with respect to the Clorox Plan “with the care, skill, prudence,  
13 and diligence under the circumstances then prevailing that a prudent man acting in  
14 a like capacity and familiar with such matters would use in the conduct of an  
15 enterprise of a like character and with like aims.”  
16  
17

18 46. Defendants have continuously breached their duty of prudence under  
19 29 U.S.C. § 1104(a)(1)(B) throughout the class period by declining to use the  
20 forfeited funds in the plan to eliminate the administrative expenses charged to  
21 participant accounts and instead using such Plan assets to reduce the Company’s own  
22 contributions to the Plan.  
23  
24

25 47. Defendants failed to engage in a reasoned and impartial decision-  
26 making process to determine that using the forfeited funds in the Plan to reduce the  
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1 Company's own contribution expenses, as opposed to the administrative expenses  
2 charged to participant accounts, was in the best interest of the Plan's participants or  
3 was prudent, and failed to consider whether participants would be better served by  
4 another use of these Plan assets after considering all relevant factors.  
5

6 48. By declining to use forfeited funds in the Plan to eliminate the  
7 administrative expenses charged to participant accounts, and instead using such Plan  
8 assets to reduce the Company's own contribution expenses, Defendants caused the  
9 Plan to receive fewer contributions that would otherwise have increased Plan assets  
10 and caused participants to incur expense deductions from their individual accounts  
11 that would otherwise have been covered in whole or in part by utilizing the forfeited  
12 funds to pay Plan expenses.  
13  
14  
15

16 49. As a direct and proximate result of Defendants' fiduciary breaches  
17 described herein, the Plan suffered injury and loss for which Defendants are  
18 personally liable and are subject to appropriate equitable relief, pursuant to 29 U.S.C.  
19 § 1109, including, without limitation, the disgorgement of all ill-gotten profits to  
20 Defendants resulting from the breach of their duty of prudence.  
21  
22

23 50. Each Defendant knowingly participated in the breach of the other  
24 Defendants, knowing that such acts were a breach, enabled other Defendants to  
25 commit a breach by failing to lawfully discharge its own fiduciary duties, knew of  
26 the breach by the other Defendants and failed to make any reasonable effort under  
27  
28

1 the circumstances to remedy the breach. Thus, each Defendant is liable for the losses  
2 caused by the breach of its co-fiduciary under 29 U.S.C. § 1105(a).

3  
4 **THIRD CLAIM**

5 **BREACH OF ERISA’S ANTI-INUREMENT PROVISION**

6 **(29 U.S.C. 1103(c)(1))**

7  
8 51. Plaintiff realleges and incorporates herein by reference each and every  
9 allegation contained in the preceding paragraphs of this Complaint as though fully  
10 set forth herein.

11  
12 52. Pursuant to 29 U.S.C. § 1103(c)(1), “the assets of a plan shall never  
13 inure to the benefit of any employer and shall be held for the exclusive purpose of  
14 providing benefits to participants in the plan and their beneficiaries and defraying  
15 reasonable expenses of administering the plan.”

16  
17 53. The balance in a participant’s accounts that a participant forfeits when  
18 incurring a break in service prior to full vesting of the Company’s contributions to  
19 the participant’s account is an asset of the Clorox Plan.

20  
21 54. By electing to utilize these Plan assets as a substitute for the Company’s  
22 own future contributions to the Plan, thereby saving the Company millions of dollars  
23 in contribution expenses, Defendants caused the assets of the plan to inure to the  
24 benefit of the employer in violation of 29 U.S.C. 1103(c)(1).

25  
26  
27 ///

55. Each Defendant is personally liable under 29 U.S.C. § 1109(a) to make good to the Plan any losses to the Plan resulting from violation of ERISA’s anti-inurement provision as alleged in this claim and to restore to the Plan all profits secured through their use of Plan assets, and is subject to other equitable or remedial relief as appropriate.

#### **FOURTH CLAIM**

#### **PROHIBITED TRANSACTIONS**

#### **(29 U.S.C. 1106(a)(1))**

56. Plaintiff realleges and incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

57. 29 U.S.C. § 1106(a)(1) provides that “[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . exchange . . . of any property between the plan and a party in interest . . . or use by or for the benefit of a party in interest, of any assets of the plan.”

58. Clorox and the Committee are parties in interest, as that term is defined under 29 U.S.C. §1002 (14), because they are Plan fiduciaries and because Clorox is the employer of Plan participants.

///



1           59. By electing to use forfeited funds in the Plan as a substitute for future  
2 employer contributions to the Plan, and thereby saving the Company millions of  
3 dollars in contribution expenses, Defendants caused the Plan to engage in  
4 transactions that constituted a direct or indirect exchange of existing Plan assets for  
5 future employer contributions and/or a use of Plan assets by or for the benefit of a  
6 party in interest.  
7

8  
9           60. As a result of these prohibited transactions, Defendants caused the Plan  
10 to suffer losses in the amount of the Plan assets that were substituted for future  
11 employer contributions and the lost investment returns on those assets.  
12

13           61. Each Defendant is personally liable under 29 U.S.C. § 1109(a) to make  
14 good to the Plan any losses to the Plan resulting from the prohibited transactions  
15 alleged in this claim, to reverse and/or correct the prohibited transactions, to restore  
16 to the Plan all assets and profits obtained through the use of Plan assets and is subject  
17 to other equitable or remedial relief as appropriate.  
18

19  
20                                   **FIFTH CLAIM**

21                                   **PROHIBITED TRANSACTIONS**

22                                   **(29 U.S.C. 1106(b)(1))**

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24           62. Plaintiff realleges and incorporates herein by reference each and every  
25 allegation contained in the preceding paragraphs of this Complaint as though fully  
26 set forth herein.  
27  
28



1           68. This claim is asserted against Clorox only.

2           69. Clorox oversaw the overall governance of the Plan and had the  
3 authority to delegate fiduciary responsibilities.  
4

5           70. Clorox created the Committee to assist in the management of the Plan  
6 and delegated to the Committee the authority and discretion to direct the trustee with  
7 respect to the crediting and distribution of the Plan assets.  
8

9           71. A monitoring fiduciary must ensure that the person to whom it  
10 delegated fiduciary duties is performing its fiduciary obligations and must take  
11 prompt and effective action to protect the plan and participants when the delegate  
12 fails to properly discharge its duties. To the extent any of the fiduciary  
13 responsibilities of Clorox were delegated to another fiduciary, the Company's  
14 monitoring duties included an obligation to ensure that any delegated tasks or  
15 responsibilities were being performed in accordance with ERISA's fiduciary  
16 standards.  
17  
18  
19

20           72. Clorox breached its fiduciary monitoring standard with respect to the  
21 Committee by, among other things, failing to monitor the Committee's management  
22 and use of forfeited funds in the Plan and by failing to take steps to ensure that the  
23 Committee was discharging its duties with respect to Plan assets for the sole benefit  
24 of Plan participants and beneficiaries.  
25  
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73. As a direct result of the breach of its fiduciary duty to monitor, the Plan suffered losses.

**PRAYER FOR RELIEF**

For these reasons, Plaintiff, on behalf of the Plan and all similarly situated Plan participants and beneficiaries, respectfully requests that the Court:

- find and declare that Defendants have breached their fiduciary duties and engaged in prohibited conduct and transactions as described above;
- find and adjudge that Defendants are personally liable to make good to the Plan all losses to the Plan resulting from each violation of ERISA described above, and to otherwise restore the Plan to the position it would have occupied but for these violations;
- order the disgorgement of all assets and profits secured by Defendants as a result of each violation of ERISA described above;
- determine the method by which Plan losses under 29 U.S.C. § 1109 should be calculated;
- order Defendants to provide all accounting necessary to determine the amounts Defendants must make good to the Plan under 29 U.S.C. § 1109(a);

///

- remove the fiduciaries who have breached their fiduciary duties and enjoin them from future ERISA violations;
- surcharge against Defendants and in favor of the Plan all amounts involved in any transactions which such accounting reveals were improper, excessive and/or in violation of ERISA;
- certify the class, appoint Plaintiff as a class representative, and appoint Hayes Pawlenko LLP as class counsel;
- award to Plaintiff and the class their attorneys' fees and costs under 29 U.S.C. § 1132(g)(1) and the common fund doctrine;
- order the payment of interest to the extent it is allowed by law; and
- grant other equitable or remedial relief as the Court deems appropriate.

### **DEMAND FOR JURY TRIAL**

Plaintiff hereby demands trial of these claims by jury to the extent authorized by law.

DATED: October 18, 2023

HAYES PAWLENKO LLP

By: /s/Kye D. Pawlenko  
Matthew B. Hayes  
Kye D. Pawlenko  
Attorneys for Plaintiffs